

## APPENDIX "A"

FROZEN FOOD EXPRESS, *Plaintiff*,Ezra Taft Benson, Secretary of Agriculture of the United States, *Intervening Plaintiff*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*,Common Carrier Irregular Route Conference of American Trucking Association et al., *Intervening Defendants*.

Civ. Nos. 8285, 8396.

United States District Court,  
S. D. Texas, Houston Division.

Jan. 26, 1955.

Phinney &amp; Hallman, Carl L. Phinney, Dallas, Tex., for plaintiff.

Stanley N. Barnes, Asst. Atty. Gen. and Charles W. Bucy, Associate Sol., Washington, D. C. for ~~the~~ intervening plaintiff.

Malcolm R. Wilkey, U. S. Atty., Houston, Tex., and Edward M. Reidy, Chief Counsel, and Leo Pou, Associate Counsel, of Interstate Commerce Commission, Washington, D. C., for defendants.

Callaway, Reed, Kidwell &amp; Brooks, Rollo E. Kidwell, Dallas, Tex., Todd, Dillon &amp; Curtiss, Clarence D. Todd, Peter T. Beardsley, Washington, D. C., Baker, Botts, Andrews &amp; Shepherd, J. C. Hutcheson, III, and Edwin N. Bell, Houston, Tex. Macleay &amp; Lynch, David G. Macdonald and Francis W. McNerny, Washington, D. C., Reeder, Gisler &amp; Griffin, Lee Reeder, Kansas City, Mo., J. W. Nisbet, Chicago, Ill., Carl Helmetag, Jr., Philadelphia, Pa., Rice, Carpenter &amp; Carraway, Washington, D. C., Fulbright, Crooker, Freeman, Bates &amp; Jaworski,

W. H. Vaughan, Jr., Houston, Tex., for intervening defendants.

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

CONNALLY, District Judge.

Filed pursuant to Secs. 1336, 1398, and 2321-2325, of Title 28; to Sec. 1009, of Title 5; and to Sec. 305(g), of Title 49 U.S.C.A., each of the foregoing civil actions attacks and seeks to restrain enforcement of an order of the Interstate Commerce Commission. Presenting the same question of law, and substantial identity of parties, the actions were consolidated for hearing and trial. The question for determination is whether a number of different commodities, as later noted herein, all of which have their origin on the farm or ranch, fall within the scope of the so-called agricultural exemption, Sec. 203(b) (6) of Part II of the Interstate Commerce Act (Title 49 U.S.C.A. § 301 et seq.). By terms of the last-mentioned statute, motor vehicles used in carrying property consisting of "ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)", are exempt from Interstate Commerce Commission control (save for minor exceptions not here pertinent). The plaintiff in each of the consolidated actions, being a trucking concern holding a certificate of convenience and necessity from the Commission, desires to carry some or all of the commodities in question, unrestricted by the terms of its own certificate, or by other Commission regulation. Hence the plaintiff, supported to a considerable extent in this contention by the Secretary of Agriculture of the United States, urges upon the Court a broad interpretation of the statutory language "agricultural commodities (not including manufactured products thereof)", which would have the net result of enlarging this so-called agricultural exemption. The Commission, on the other hand, and those intervenors

who align themselves with the Commission, urge upon us that most of the commodities in question, by virtue of the treatment and processing which they receive, either have lost their identity as "agricultural commodities", or have become "manufactured products thereof". The result of this argument is drastically to restrict the scope of the exemption.

*Civil Action 8285:*

In June, 1948, the Interstate Commerce Commission, of its own motion, instituted a proceeding, being MC-C-968 on its docket, in the nature of an investigation, to determine the meaning and scope of the term "agricultural commodities (not including manufactured products thereof)", as used in the above-mentioned statute. The proceeding was widely noticed in the affected trades and industries. Many interested parties, including the Secretary of Agriculture of the United States, the Commissioners of Agriculture from a number of the States, associations of shippers, motor carriers, and others, intervened. After extended hearings, during which much expert testimony was offered as to the manner and method of cleaning, preparing, packaging, and otherwise processing the various commodities in question, the Commission issued its report and order entitled "Determination of Exempted Agricultural Commodities", 52 I.C.C. Reports, Motor Carrier Cases, 511-566. In such report, the Commission announced its definition of such statutory term,<sup>1</sup> which definition it then undertook to apply to the various commodities under

<sup>1</sup> "In No. MC-C-968, we find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203(b) (6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations."

consideration, and enumerated those which it found to come within the statutory language, and those which it found to fall without.<sup>2</sup> Thereupon, the proceeding was terminated and removed from the Commission docket.

The plaintiff Frozen Food Express was not a party to the proceeding before the Commission. By amended complaint filed here July 12, 1954, plaintiff alleges that it desires to carry agricultural commodities (not including manufactured products thereof) for hire, to and from all points within the United States, irrespective of the limitations imposed by its own certificate; that the report of April 13, 1951, deprives plaintiff of its right to do so. Alleging that the action of the Commission in entering the report in question, was arbitrary, capricious and unreason-

<sup>2</sup> "We find that the term 'agricultural commodities' (not including manufactured products thereof) as used in section 203 (b) (6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded or chopped up; (2) fruits, berries, and vegetables dried naturally or artificially; (3) seeds, including inoculated seeds, but not seeds prepared for condiment use or those which have been deawned, scarified or otherwise treated for seeding purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats, barley and sorghum grain, not including dehulled rice and oats, or pearled barley; (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized, milk, homogenized milk and cream, vitamin 'D' milk, and vitamin 'D' skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding: whole or shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey."

able, that it constituted an abuse of discretion and a violation of the Commission's statutory powers, the plaintiff here seeks an injunction to restrain the Commission and the United States from enforcing or recognizing the validity of such report; restraining interference with the plaintiff's proposed transportation of such agricultural commodities (not including manufactured products thereof), and seeks an order of this Court declaring the report of the Commission of April 13, 1951, to be null and void.

The Secretary of Agriculture has intervened, denominating himself "Intervening Plaintiff". He makes common cause with plaintiff in contending that a number of commodities<sup>3</sup> are within the exemption. Several trucking associations, and some sixty southern and western railroad companies, have intervened. These intervenors take a contrary view, and support the report of the Interstate Commerce Commission.

[1] We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an "order" subject to judicial review under any of the statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by *U. S. v. Los Angeles*

- <sup>3</sup> (1) Slaughtered meat animals and fresh meats;  
 (2) Dressed and cut-up poultry, fresh or frozen;  
 (3) Feathers;  
 (4) Raw shelled peanuts and raw shelled nuts;  
 (5) Hay chopped up fine;  
 (6) Cotton linters and cottonseed hulls;  
 (7) Frozen cream, frozen skim milk, and frozen milk;  
 (8) Seeds which have been deawned, searified, or inoculated."

& S. L. R. Co., 273 U.S. 299, 47 S. Ct. 413, 414, 71 L.Ed. 651, holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking for a unanimous Court there, aptly describes the order in issue here:

"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation."

The proponents of jurisdiction here rely upon *Columbia Broadcasting System v. U. S.*, 316 U.S. 407, 62 S. Ct. 1194, 86 L.Ed. 1563. It was there held that an order of the Federal Communications Commission promulgating certain rules and regulations requiring that the Commission deny a license to broadcasting stations under certain circumstances, was subject to judicial review, upon a showing by the complaining party of strong equitable considerations. This authority is clearly distinguishable from the present case. The order there in question was entered in the exercise of the agency's rule-making power. Such orders, together with those fixing rates and those determining controversies before the administrative body, have long been recognized as subject to review, *U. S. v. Los Angeles & S. L. R. Co.*, *supra*.

[2] Likewise, the complaining party there showed an immediate and continuing threat of irreparable injury if the order were not reviewed. It is not so here. The statement of plaintiff that it desires to carry for hire most or all of the commodities on the Commission's proscribed list, and that if it does so, the Commission likely will seek injunctive relief to restrain plaintiff, shows no basis for the intervention of a court of equity. Plaintiff will have an adequate remedy in the event of such interference.

It follows that Civil Action 8285 will be dismissed.

*Civil Action 8396:*

A complaint was filed December 23, 1953, with the Interstate Commerce Commission by East Texas Motor Freight Lines, Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., charging that Frozen Food Express was and had been engaged in transporting fresh and frozen dressed poultry, and fresh and frozen meats, and meat products, for hire, between points in interstate commerce not authorized by its certificate of convenience and necessity. Frozen Food readily admitted that it had been so engaged, but defended on the theory that such products all were within agricultural exemption. The Commission found each of these products not to be within the exemption, and ordered Frozen Food Express to cease and desist from such unauthorized transportation. The present proceeding was filed by Frozen Food Express to review that order.<sup>1</sup>

While the present action was pending in this Court, the Secretary of Agriculture of the United States filed with the Commission his petition for leave to intervene, pursuant to Sec. 1291, of Title 7 U.S.C.A. This request was denied; and the Secretary appears here as "Intervening Plaintiff", contending (1) that the proceedings before the Commission were null and void by reason of the failure

<sup>1</sup> Plaintiff has abandoned the contention that meat products are within the agricultural exemption, and this commodity will not be further considered here.

of the Commission to notify him of the pendency thereof, Sec. 1291(a), of Title 7 U.S.C.A.; (2) that the proceedings should be remanded to the Commission by reason of its error of law in having denied him leave to intervene; and (3) that the cease and desist order should be enjoined by reason of the alleged error of the Commission in holding fresh and frozen meats, and fresh and frozen dressed poultry, to be beyond the limits of the agricultural exemption.

The rail carriers and trucking associations which intervened in Civil Action 8285, also appear in this action. They support the Commission, and oppose the position taken by the plaintiff and the Secretary of Agriculture.

Armour & Company, being engaged at various points in the United States in the slaughter of livestock and the killing, dressing, and sale of poultry, has intervened, urging that dressed poultry is an exempt commodity, that meat is not.

{3} The position taken by the Secretary of Agriculture that the proceeding before the Commission was null and void in its entirety by reason of the failure of the Commission to give him notice thereof, need not long detain us. The proceeding there was not one with respect to "rates, charges, tariffs, and practices" relating to the transportation of farm products, and hence was not one of which the Secretary was entitled to notice under the statute. Secs. 1291 and 1622, of Title 7 U.S.C.A. *U. S. v. Pennsylvania R. Co.*, 242 U.S. 208, 37 S. Ct. 95, 61 L.Ed. 251; *Baltimore & Ohio R. Co. v. U. S.*, 277 U.S. 291, 292, 48 S. Ct. 520, 72 L.Ed. 885; *Missouri Pac. R. R. Co. v. Norwood*, 283 U.S. 249, 51 S. Ct. 458, 75 L.Ed. 1010. The Commission likewise did not commit an error of law in denying the Secretary's Petition of Intervention, filed there while the present proceeding was pending here.

{4} Most able and exhaustive treatment is given the question now before us, in so far as it concerns dressed

poultry, by Judge Gavin of the United States District Court for the Northern District of Iowa, in *Interstate Commerce Commission v. Allen E. Kroblin, Inc.*, 113 F.Supp. 599, 600, affirmed, 8 Cir., 212 F.2d 555, certiorari denied 348 U.S. 836, 75 S. Ct. 49. Reviewing the long struggle between the Interstate Commerce Commission in its efforts to restrict the application of the exemption in question; and the Department of Agriculture and others in seeking to expand it; reviewing the legislative history of the Motor Carrier Act of 1935, and various proposed amendments thereto; and considering the congressional intent which prompted the insertion of the agricultural exemption, Judge Gavin concluded that dressed poultry constituted an "agricultural commodity", and did not constitute a "manufactured product thereof". Hence, such commodity was within the exemption. It is sufficient to state that we agree with those conclusions as to fresh and frozen dressed poultry.

[5] Counsel for the Commission urges that this Court should disregard the Kroblin case, on the argument that the only question before us is one of the adequacy of the evidence before the Commission. It is said that the order which was entered was one within the general purview of the Commission's authority, and that if its findings are supported by "substantial evidence", this Court has no alternative but to leave it undisturbed. While we do not quarrel with such statement as a general proposition of law, the argument is not convincing in its application to the present record. The primary facts before the Commission were without dispute and were the subject of stipulation. Reduced to simplest form, they showed that before a chicken or duck became "dressed poultry", the bird was killed, his feathers and entrails removed, he was chilled, and in some cases frozen, packaged, etc. In addition, such "facts" consisted of evidence of so-called "expert" nature, that this treatment or processing of the chicken or duck rendered him a "manufactured product".

[6, 7] It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact; calling for the application of the processes of legal reasoning and of principles of statutory construction. The fact that the Commission's findings are supported by an "expert" who gives his opinion that a dressed chicken is a manufactured product, does not foreclose the question, nor remove it from the scope of judicial review. *Baumgartner v. U. S.*, 322 U.S. 665, 64 S. Ct. 1240, 88 L.Ed. 1525; *Lehmann v. Acheson*, 3 Cir., 206 F.2d 592; *Galena Oaks Corp. v. Scofield*, 5 Cir., 218 F.2d 217.

[8] In our opinion, fresh and frozen meat does not fall within the category either of "ordinary livestock" or of "agricultural commodities", and hence is not within the exemption. Since the enactment of Part II of the Interstate Commerce Act in 1935, motor vehicles used exclusively in carrying "livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)", have been exempt. By amendment in 1940, the term "ordinary" was inserted immediately before the word "livestock". The term "ordinary livestock" is defined in Sec. 20(11) of the Act as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses".

Referring only to the live animals, "ordinary livestock" may not be tortured to include the carcasses of slaughtered meat animals, or the meat which is the product of butchering. Meat has been regarded generally in the industry as a controlled commodity for some twenty years. Congress has dealt with the agricultural exemption on many occasions. Considering the ease with which the Congress might have added appropriate language to evidence its intent to exempt fresh or frozen meat from Interstate Commerce Commission control, if it so desired, the absence

of such language indicates that no such intent was entertained.

Nor may meat, fresh or frozen, be considered an "agricultural commodity" for present purposes. The exemption has treated the live meat animal in a separate generic class from "agricultural commodity" since the enactment of the statute; and if the live animal, on entering the slaughter pen or the packing house, is not an "agricultural commodity", we are unable to see how he becomes one on emerging therefrom in the form of beef or pork. The Commission was correct, in our opinion, in holding fresh and frozen meat to be non-exempt.

The enforcement of the order of the Interstate Commerce Commission, MC-C-1605, East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express, is enjoined and restrained in so far as said order interfered with, enjoins or restrains the plaintiff Frozen Food Express from transporting fresh and frozen dressed poultry in interstate commerce (when the motor vehicles used in carrying such poultry are not used for carrying any other property or passengers for compensation). Other relief sought by plaintiff is denied.

Clerk will notify counsel.

KENNERLY, District Judge (concurring in part and dissenting in part).

I concur with all the foregoing opinion except the decision in Civil Action 8396 with respect to fresh meat and frozen meat. As to that I respectfully dissent.

I think all of Section 303(b) should be given a broad and liberal construction, and that Section 303(b) (6) should be construed as including fresh meat and frozen meat. I think we should not only follow the reasoning of both the District Court and Court of Appeals in the Krobin case with respect to dressed poultry and frozen dressed poultry, but that what is said is also applicable to fresh meats and frozen meats.

**APPENDIX "B"****INTERSTATE COMMERCE COMMISSION**

No. MC-C-1605

**EAST TEXAS MOTOR FREIGHT LINES, INC., ET AL.**

v.

**FROZEN FOOD EXPRESS**

Submitted April 2, 1954. Decided July 13, 1954

Defendant's unauthorized operations in the transportation of fresh and frozen meats and fresh and frozen dressed poultry found not to be within the exemption provided in section 203 (b) (6) of the Interstate Commerce Act and to be unlawful. Defendant ordered to cease and desist from performing the service found to be unlawful.

Rollo E. Kidwell, David G. Macdonald, Francis W. McInerney, and Lee Reeder for complainants.

Clarence D. Todd, Dale C. Dillon, and Charles F. Riddle for intervener in support of complainants.

Carl L. Phinney and Leroy Hallman for defendant.

**Report of the Commission****BY THE COMMISSION:**

No oral hearing has been held in this proceeding, and it has been submitted on a stipulated statement of facts. In view of the lack of any dispute as to the facts, the clarity of the issues, and the desirability of an early decision, no report of an examiner is deemed necessary.

By complaint filed December 23, 1953, East Texas Motor Freight Lines, a corporation, of Dallas, Tex., Gillette Motor Transport, Inc., of Dallas, and Jones Truck Lines, Inc.,

of Springdale, Ark., hereinafter called East Texas, Gillette, and Jones, respectively, all motor common carriers, allege that the defendant, Frozen Foods Express, of Dallas, a corporation, is, and has been, engaged in the transportation of fresh and frozen meats, meat products, and dressed poultry from, to, and between points not authorized in any certificate held by it. Complainants seek an order requiring defendant to cease and desist from the alleged unauthorized and unlawful operations and such other and further relief as may be considered proper in the premises. By order entered March 4, 1954, the Irregular Route Motor Common Carrier Conference of American Trucking Associations, Inc., hereinafter referred to as the conference, was permitted to intervene in support of complainants.

Complainants transport general commodities over regular routes in an area which includes Illinois, Missouri, Oklahoma, Tennessee, and Texas. Defendant is authorized to transport frozen foods, fresh foods, including fruits and vegetables, packinghouse products, and dairy products, from, to, or between specified points in Arkansas, California, Illinois, Louisiana, Kansas, Michigan, Missouri, Oklahoma, Tennessee, Texas, and Wisconsin. It admits that it has, and now is, engaged in the transportation of fresh and frozen meats and fresh and frozen dressed poultry from and to points not authorized by its certificates. Following is a list of typical shipments transported by defendant beyond the scope of its certificates during September, October, and November, 1953:

Commodity	Weight <i>Pounds</i>	Origin	Destination
Beef and mutton	26,325	San Antonio, Tex....	Cincinnati, Ohio.
Cut-up poultry	25,674	Fayetteville, Ark. . .	Norwood, Ohio.
Dressed poultry	25,276	Bentonville, Ark. . . .	Dayton, Ohio.
Do	23,890	do . . . . .	Columbus, Ohio.
Fresh beef	23,061	Fort Worth, Tex. . . .	Columbus, Ohio.
Frozen turkeys	23,900	Bentonville, Ark. . . .	Turlock, Calif.
Veal trimmings	29,967	Fort Worth, Tex. . . .	Toledo, Ohio.
			Louisville, Ky.
			Cincinnati, Ohio.

In each such instance no commodity other than that indicated was transported at the same time in the same vehicle.

Defendant, relying upon *Interstate Commerce Commission v. Allen E. Kroblin, Inc.*, 113 F. Supp. 599, which was affirmed on appeal, 212 F. (2d) 555, contends that the operations complained of come within the exemption provided by section 203 (b) (6) of the act, and may be performed without specific authority from this Commission. Section 203 (b) (6), so far as here material, provides as follows:

Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include \* \* \* (6) motor vehicles used in carrying property consisting of *ordinary livestock*, fish (including shell fish), or *agricultural (including horticultural) commodities (not including manufactured products thereof)*, if such motor vehicles are not used in carrying any other property, or passengers, for compensation \* \* \* . [Italics supplied.]

We have involved here the transportation of two types of commodities, namely, (1) fresh or frozen dressed poultry and (2) fresh or frozen dressed meat or, more precisely, those packinghouse products derived from the slaughter of ordinary livestock. Although, as will be seen, we conclude that neither type of commodity is within the exemption provided by the statute, the reasoning in support of such conclusion differs as to the two classes of commodities. Obviously the exemption, if any, of vehicles used in the transportation of dressed poultry depends upon whether that commodity is an "agricultural commodity" or a "manufactured product thereof." In the case, however, of dressed livestock of those packinghouse products derived from the slaughter of livestock, that issue is not in our opinion controlling.

As originally enacted in 1935, section 203 (b) (6) exempted transportation performed in "motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)." In 1938 the section was amended to read "motor vehicles used in carrying property consisting of livestock, fish (including shell fish), or agricultural commodities (not including the manufactured products thereof) if such motor vehicles are not used in carrying any other property or passengers for compensation." In 1940 the word "livestock" in the exemption was modified to read "ordinary livestock," a term previously defined in section 20 (11) of the act as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses."

Thus, from the beginning of motor-carrier regulation by us an exemption has been provided in section 203 (b) (6) of vehicles used in carrying of "livestock" or "ordinary livestock," and also in the same section an exemption of vehicles used in the carrying of agricultural commodities." The latter exemption does not duplicate the former nor did it establish a second exemption of vehicles used in carrying ordinary livestock. On the other hand, it must be concluded that the exemption of vehicles used in carrying ordinary livestock ends upon the slaughter of the livestock when it loses its identity as livestock, and that there was no intent in the same section to provide a further or second exemption of vehicles carrying the packinghouse products which result from the slaughter, on the theory that such commodities are "agricultural commodities." A congressional intent, had there been one to exempt the transportation not only of ordinary livestock but also of the products of the slaughter thereof, would unquestionably have been so simple to state that the failure to do so negatives any such strained construction of the language actually used to accomplish that end. This conclusion con-

forms to that made by us in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, hereinafter referred to as the *Exemption* case.

The record herein, apparently for the purpose of demonstrating that fresh meat is in any event a "manufactured product" of an agricultural commodity, describes the slaughtering processes at some length. This evidence as it relates to the processing of livestock is beside the point if our conclusion is correct that the exemption of vehicles used in carrying "agricultural commodities" does not duplicate the exemption of vehicles used in carrying "ordinary livestock." Nevertheless, we shall review it briefly and later we shall refer to other evidence designed to show that fresh and frozen meats which are the products of the slaughter of ordinary livestock are, in any event, manufactured products.

Cattle are raised on farms and ranches and generally are shipped alive by the growers to stockyards operated by, or in conjunction with, meatpacking companies. The slaughtering process begins only after the animals reach the stockyards and consists of (1) holding the cattle in pens, including resting, watering, and feeding, (2) killing, including knocking, shackling, hoisting, and bleeding, (3) skinning and cutting, (4) washing, (5) stamping, scaling, and grading, (6) hot clothing, and (7) chilling. In processing the animals for slaughter, various mechanical and other aids are employed, such as pens, runways, pulleys and chains, overhead conveyors, electric saws, mechanical slides, water heaters, ribbon branders, and chilling systems entailing the use of brine tanks, pumps, and related gear.

Chickens and other poultry intended to be used for food are raised on farms or by so-called "commercial broiler houses." Poultry is raised on farms principally for the production of eggs. Their sale for killing is largely incidental to that production. The commercial broiler

houses, on the other hand, are primarily engaged in producing poultry for food purposes. From 3 to 4 lots are usually raised and marketed during the course of a year. In most instances, chickens, turkeys, and other poultry are shipped alive from the farm or commercial broiler house to the processing plant. Only a small percentage of the total number raised are killed and processed by the grower. The principal exceptions are the Long Island, N. Y., duck industry and certain growers' cooperatives, which carry on all operations incidental to the marketing of dressed poultry including the growing, killing and processing. In the packing plant, the birds are first placed on an endless chain and then carried by the chain through the various stages of processing, which include killing, picking, pinning, singeing, cropping and venting; washing, chilling, eviscerating, packaging, and freezing. Picking is done both by machinery and by hand, the mechanical picker consisting of revolving drums equipped with rubber fingers. In some plants the removal of feathers is accomplished by the use of hot wax. The usual method of chilling is to place the carcasses in metal baskets which are then submerged in tanks of ice water long enough to remove all body heat. In the eviscerating process, the body cavity is cut open and the viscera removed, with the liver, heart, and gizzard being cleaned and replaced in the carcass. The eviscerated poultry is then usually wrapped in waterproof paper and packed with ice in crates or barrels. Various methods of dry wrapping are also employed. The freezing of poultry must be accomplished as rapidly as possible and is generally done in a mechanically refrigerated room in which the temperature is maintained at minus 40° Fahrenheit and the air is circulated at speeds up to 70 miles an hour. After the birds have been frozen by this quick-freeze method, they are placed in cold storage until ready for shipment.

The evidence also contains, in exhibit form, numerous booklets, manuals, pamphlets, and statistical studies pub-

lished in 1929 and later by various Federal agencies, including the Executive Office of the President and United States Departments of Commerce and Labor, indicating that, for industrial classification purposes, the slaughter of livestock, meatpacking, and the dressing of poultry are regarded as manufacturing activities. As examples, in a 1933 publication of the Bureau of the Census, United States Department of Commerce, entitled *Foreign Commerce and Navigation of the United States*, meats are classified as dutiable imports under the listing of "Manufactured Foodstuffs." Four manuals issued by the Bureau of the Budget, Executive Office of the President, in 1940, 1943, 1945, and 1946, variously entitled *Standard Industrial Classification*, *Standard Industrial Classification Manual*, or *Standard Commodity Classification*, all classify meatpacking and poultry dressing as manufacturing industries, and the products thereof as manufactured foods. A 1950 publication of the United States Department of Commerce, entitled *Schedule A Statistical Classification of Imports into the United States* lists fresh and frozen meats and dead, dressed, or undressed poultry as "Meat Products." "Meat Products" is listed under the broader classification of "Agricultural Manufactured Foodstuffs and Beverages."

In the *Exemption* case, we reported the result of an investigation instituted on our own motion into and concerning the meaning of the term "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b) (6). We concluded that the term "agricultural commodities" embraces all products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees, such as milk, wool, eggs, and honey; and that the parenthetical expression "not including manufactured products thereof" has the effect of limiting agricultural commodities to those in their natural

state and those which, as a result of treating or processing, have not acquired new forms, qualities, properties, or combinations. At pages 546 and 547, in discussing the identical questions here in issue, we said:

The words "agricultural commodities (not including manufactured products thereof)" do not include ordinary livestock as the latter are separately mentioned in section 203 (b) (6). Section 20 (11) of the act provides that "The term 'ordinary livestock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses." It necessarily follows that the term as used in section 203 (b) (6) has the same meaning. Livestock, such as race horses, show horses, and the like do not come under the classification of "ordinary livestock," and the transportation of animals of this type is subject to the certificate or permit requirements of the act. *Owsley Common Carrier Application*, 31 M. C. C. 778. Poultry, however, are included within the broader description "agricultural commodities." It is clear also that certain products of live animals, such as are embraced in the definition of ordinary livestock, are likewise included; and there is no dispute that wool, at least in the form sheared from the sheep,<sup>1</sup> is an agricultural commodity. These products are in themselves basic agricultural commodities, separate and distinct from the livestock. But slaughtered animals are not embraced in the definition of ordinary livestock and we are impelled to conclude that the products thereof, such as fresh meats and meat products, do not fall within the description "agricultural commodities" as used in section 203 (b) (6). It logically follows that neither killed poultry nor any products thereof come within the term under consideration. We conclude that poultry other than that alive is not an agricultural commodity within the meaning of section 203 (b) (6).

<sup>1</sup> In a report on reconsideration in the *Exemption* case, 62 M. C. C. 87, 89, we found that cleaned or scoured raw wool and mohair and redried tobacco leaf are within the agricultural exemption.

Further, we are of the opinion that birds of the air such as doves and pigeons are not agricultural commodities.

The facts before us in this proceeding are more complete as they relate to this particular issue than were those before us in the *Exemption* case, but they contain nothing to warrant any different conclusions. On the contrary, they confirm the conclusions there reached.

On all the evidence now before us, we conclude (1) that the exemption of vehicles used in carrying "ordinary livestock" does not extend to fresh or frozen meats, the products of the slaughter of such livestock; (2) that the exemption of vehicles used in carrying "agricultural (including horticultural) commodities (not including the manufactured products thereof)" does not embrace vehicles used in carrying ordinary livestock in view of the specific exemption in the same section of vehicles used in carrying that commodity; and (3) that the exemption of vehicles used in carrying "agricultural (including horticultural) commodities (not including manufactured products thereof)" does not in any event extend to vehicles used in carrying either fresh or frozen meat or fresh or frozen dressed poultry.

Although on somewhat similar facts, at least with respect to dressing and packing poultry, it was held in the *Kroblin* case that so-called New York-dressed poultry or eviscerated poultry were not "manufactured products" of agricultural commodities within the intent and meaning of section 203 (b) (6), we have not acquiesced in the court's decision, and a review thereof has been sought. Until a final decision contrary to the findings in the *Exemption* case is reached by the courts, we adhere to the conclusion that the transportation of fresh and frozen meats and fresh and frozen dressed poultry are subject to the certificate and permit requirements of the act. In any event, and regardless of the final outcome of the *Kroblin* case, it seems clear that

slaughtered livestock or the products of the slaughter of livestock are neither ordinary livestock nor agricultural commodities as those terms are commonly used and understood. It follows that vehicles used in the transportation of slaughtered livestock or the products of slaughtered livestock do not come within the purview of the exemption in section 203 (b) (6).

The conclusion that fresh and frozen meats, the products of the slaughter of ordinary livestock are not "agricultural commodities" within the meaning of the statute, finds definite support in *Southwestern Trading Co. v. United States*, 208 F. (2d) 708, wherein the Court of Appeals for the Fifth Circuit affirmed on appeal in a criminal proceeding a finding that vehicles used in carrying cowhides were not within the exemption of vehicles engaged in carrying "agricultural commodities." In so doing, the court said:

- In a proceeding before the Interstate Commerce Commission, reported in 52 Motor Carrier Cases 511, the history of the legislation was reviewed, and it was found that the primary purpose of the partial exemption provided in said Section 303 (b) (6) was to aid the farmer in agricultural pursuits; that the words agricultural commodities should be construed in their plain, usual, and commonly accepted sense. The Commission proceeded to group agricultural commodities under three general headings: Those which are produced by plants; those which are produced continually by living animals kept on the farm, such as milk, eggs, and wool; and live poultry. The only group into which cow hides could possibly come would be the products of animals, but it is apparent that cow hides would not be included within this group, as said classification refers only to the commodities which living animals produce continually and with regularity. The hide is a part of the animal, separable only upon its death; it is a product of slaughter only. The Commission specifically found that slaughtered animals were not embraced in the definition of ordinary livestock, and that the products thereof, such as fresh meat and meat products, did not fall within the

description "agricultural commodities" as used in Section 303 (b) (6). It stated that pelts, skins, or green and salted hides, are not agricultural commodities within the meaning of said section. The conclusion reached by the Commission is directly in point here.

Considering all of the evidence of record, we find that defendant's operations in the transportation of fresh and frozen meats and fresh and frozen dressed poultry, in interstate or foreign commerce, are not within the exemption provided in section 203 (b) (6) of the act, and that to the extent to which such transportation is not authorized in its certificates, it is unlawful and should be discontinued.

An order will be entered requiring defendant to cease and desist from the performance of the transportation found unlawful herein.

## APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

Civil Action No. 8396

FROZEN FOOD EXPRESS, ET AL., *Plaintiffs*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE  
COMMISSION, ET AL., *Defendants*.

**Judgment**

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on November 16, 1954, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 26, 1955, filed herein its opinion, containing its findings of fact and conclusions of law; now, in accordance with the said opinion, findings, and conclusions, it is hereby

ORDERED, ADJUDGED, AND DECREED as follows:

(1) The defendants, the United States of America and the Interstate Commerce Commission, be, and they hereby are, enjoined and restrained from enforcing the order of the said Commission entered July 13, 1954, in a proceeding docketed by the Commission as No. MC-C-1605, and entitled "East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express", insofar as the said order requires the said Frozen Food Express to cease and desist from transporting, or interferes with its transportation of, fresh

and frozen dressed poultry in interstate commerce for compensation unless the motor vehicle used in the carrying of such poultry is at the same time being used to carry for compensation passengers or other property not within the exemption provided in section 203 (b) (6) of the Interstate Commerce Act (49 U.S.C. 303 (b) (6)); and.

(2) All other relief sought by the plaintiffs herein, including the Secretary of Agriculture as intervening plaintiff, be, and the same hereby is, denied.

This the 23rd day of February, 1955.

/s/ JOSEPH C. HUTCHESON, JR.  
*Chief Judge, United States  
Court of Appeals for the  
Fifth Circuit*

/s/ THOMAS M. KENNERLY  
*United States District Judge*

/s/ BEN C. CONNALLY  
*United States District Judge*